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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

U.S. COMMODITY FUTURES)
TRADING COMMISSION) Case No. 8:14-cv-00283-AG-JPR
Plaintiff,)
)
v.)
)
MY FOREX PLANET, INC., a Nevada)**ORDER**
Corporation, WAL CAPITAL, S.A., a)
Costa Rica Corporation, TOP GLOBAL)
CAPITAL, INC., a Panama Corporation,)
MELODY NGANTHUY PHAN, an)
individual,)
Defendants.)

)

I. INTRODUCTION

On February 27, 2014, the Plaintiff U.S. Commodity Futures Trading Commission (“Plaintiff”) filed its Complaint [D.E. #1] in this matter against My

1 Forex Planet, Inc., Wal Capital, S.A., Top Global Capital, Inc. (collectively, the
2 “Corporate Defendants”), and Melody Nganthy Phan (together the “Defendants”
3 or “Phan Common Enterprise”), alleging, *inter alia* that the Defendants defrauded
4 members of the public (“pool participants”) of more than \$1.1 million in
5 connection with pooled investments in foreign currency exchange (“forex”), in
6 violation of the Commodity Exchange Act (“CEA” or “Act”), 7 U.S.C. §§1 *et seq.*,
7 and CFTC Regulations (“Regulations”), 17 C.F.R. §§ 1.1 *et seq.* D.E. # 1. More
8 particularly, the Plaintiff alleged that from at least January 2009 and through at
9 least February 2011 (“the Relevant Period”), the Corporate Defendants, acting
10 through their agents and the Defendant Phan, fraudulently solicited at least
11 \$3,764,214 from at least 174 customers for trading off-exchange leveraged or
12 margined forex and failed to register as a Commodity Pool Operator (“CPO”).
13

14 On June 26, 2014, the Plaintiff served the Summons, Complaint, and other
15 initiating documents on the Defendants, serving Melody Phan in her personal
16 capacity, as well as in her capacity as an Officer and Director of My Forex Planet,
17 Inc. and a control person of Wal Capital, S.A. and Top Global Capital, Inc. The
18 Complaint seeks, among other things, injunctive relief, restitution, and civil
19 monetary penalties.
20

21 The Plaintiff filed its Proofs of Service with the Clerk’s Office on July 9,
22 2014. D.E. ## 21-24. The Defendants did not answer the Complaint or otherwise
23 make an appearance in this case. On August 21, 2014, the Clerk of the Court
24

entered the Default of the Defendants. D.E. #28. On January 5, 2015 pursuant to Fed. R. Civ. P. 55(b)(2) and California Code of Civil Procedure 585(b), the Plaintiff filed a Notice of Plaintiff's Motion for Entry of Default Judgment Against the Defendants ("Motion") [D.E. # 31] and a Memorandum of Law in support of the Motion ("Memorandum of Law") [D.E. # 32].

The Court has considered carefully the Motion, the Memorandum of Law, including the Declaration of Futures Investigator Maura Viehmeyer, and the lodged exhibits, and the well-pleaded allegations in the Complaint, which are hereby taken as true, and being fully advised in the premises, the Court hereby:

GRANTS the Plaintiff's Motion and enters the following findings of fact and conclusions of law finding the Defendants liable as to all violations alleged in the Complaint. Accordingly, the Court now issues the following Order for Entry of Default Judgment, Permanent Injunction, Civil Monetary Penalty, and Ancillary Equitable Relief Against the Defendants ("Order"), which determines that the Defendants have violated 7 U.S.C. §§ 6b(a)(2)(A) and (C), 6(o)(1), 6(m)(1) (2012), and 17 C.F. R. § 5.2(b)(1) and (3) (2014).

II. FINDINGS OF FACT

A. The Parties

The Plaintiff

1. The U.S. Commodity Futures Trading Commission (“CFTC”) is an independent federal regulatory agency that is charged by Congress with the

1 administration and enforcement of the CEA and the Regulations promulgated
2 thereunder. The CFTC maintains its principal office at Three Lafayette Centre, 1155
3 21st Street, NW, Washington, D.C. 20581.
4

5 **The Defendants**

6 2. **My Forex Planet, Inc.** (“MFP”) is a Nevada corporation, which was
7 incorporated by Melody Phan in 2006. Melody Phan and her husband jointly owned
8 MFP, however, she controlled MFP: 1) Melody Phan was the sole Director and
9 President of MFP; 2) Melody Phan controlled MFP’s bank and trading accounts; and
10 3) Melody Phan made all of the hiring and firing decisions at MFP. MFP was used
11 to recruit customers for Melody Phan’s fraudulent investment schemes through
12 trading classes run by Melody Phan and other agents. MFP had pending registrations
13 with the CFTC as an introducing broker (“IB”), commodity trading advisor (“CTA”),
14 but withdrew these applications before the CFTC decided their merit.
15

16 3. **Wal Capital, S.A.** (“Wal Capital”), upon information and belief, is a
17 company owned or controlled by Melody Phan and incorporated in Costa Rica. Wal
18 Capital operated as a forex broker, offered customers self-traded forex accounts, and
19 carried customer accounts managed by Melody Phan or the other Corporate
20 Defendants. Wal Capital has never been registered with the CFTC in any capacity.
21

22 4. **Top Global Capital, Inc.** (“TGC”), upon information and belief, is a
23 company owned or controlled by Melody Phan and was incorporated in Panama.
24

1 TGC was used by Melody Phan, among other things, to operate a fraudulent forex
2 commodity pool. TGC has never been registered with the CFTC in any capacity.
3

4 5. **Melody Nganthuy Phan** (“Phan”) was last known to reside in Las
5 Vegas, Nevada, but during the Relevant Period resided in Orange County, California.
6 Phan operated her various businesses from Orange County, California. Phan owns or
7 controls the Corporate Defendants and used them to perpetrate her fraudulent
8 schemes in connection with leveraged or margined forex as a common enterprise.
9 Phan has never been registered with the CFTC in any capacity; however she
10 submitted a registration application as an Associated Person and principal of MFP,
11 but later withdrew this registration application before the CFTC decided its merit.
12

13 B. **Background: The Defendants Began Their Fraudulent Scheme**
14

15 6. In 2006, Phan incorporated MFP, and shortly after, began teaching
16 forex trading classes using the MFP entity. MFP operated out of storefront in Garden
17 Grove, California from which Phan also ran a number of unrelated businesses. MFP,
18 through Phan and other agents, touted Phan as an extremely successful forex trader
19 with a proven trading system. Once students enrolled in the forex trading classes,
20 Phan and her agents, began soliciting the students to participate in a number of other
21 forex-related businesses.
22

23 7. Initially, Phan and her agents referred MFP customers who wished to
24 begin trading forex to forex brokers with whom MFP had an established relationship
25 so that MFP could collect referral fees. After Phan incorporated Wal Capital in 2008,
26

1 she began operating it as a forex broker, offering self-traded retail forex accounts to
2 customers most of whom were based in the United States and recruited through MFP
3 trading classes.
4

5 8. In addition to MFP and Wal Capital, Phan, while acting as an
6 unregistered commodity pool operator (“CPO”), also operated a forex commodity
7 pool through TGC, which was incorporated in 2009. Phan and other agents then
8 began soliciting existing MFP and Wal Capital customers to become pool
9 participants at TGC.
10
11

12 9. By late 2009, Phan was operating the Corporate Defendants as a
13 common enterprise (collectively “Phan Common Enterprise”) out of a variety of
14 locations in California. The Phan Common Enterprise operated out of the same
15 physical locations, commingled funds, shared agents, and was under the common
16 control of Phan. Phan, on behalf of herself and the Phan Common Enterprise, used
17 additional small entities which were subject to her control to accept and disburse
18 monies for the Phan Common Enterprise, including, but not limited to: Forex
19 Franchising, Zenoost, Soleil and West Newport.
20
21 C. **The Defendants’ Fraudulent Solicitations of Wal Capital Customers and**
TGC Pool Participants
22
23

24 10. Throughout the relevant period, Phan and the Phan Common Enterprise
25 schemed to defraud individuals who became customers of her various forex-related
26 ventures. Each act or omission by Phan and the Phan Common Enterprise in
27
28

1 furtherance of the fraudulent scheme was done with the knowledge or consent of the
2 others, and was done knowingly or with reckless disregard for the truth.
3

4 11. Phan, herself and through the Phan Common Enterprise, fraudulently
5 solicited customers using MFP for at least two types of fraudulent investment
6 schemes: 1) self-traded forex accounts opened at Wal Capital; and 2) pooled forex
7 trading at TGC. Most, if not all, of these customers were U.S. residents. During the
8 relevant period, Phan, herself and through the Phan Common Enterprise, fraudulently
9 solicited at least \$1,677,762.29 from at least 112 customers who believed they
10 opened self-traded forex accounts at Wal Capital. During the relevant period, Phan,
11 herself and through the Phan Common Enterprise, fraudulently solicited and received
12 at least \$2,086,451.88 from at least 62 customers who became pool participants in a
13 pooled forex trading account at TGC.
14

15 12. At least some of these customers at Wal Capital and pool participants at
16 TCG were not eligible contract participants (“ECP”). An ECP, as relevant here, is
17 an individual who has total assets in an amount in excess of (i) \$10 million or (ii) \$5
18 million and who enters into the transaction in order to manage risk. *See* 7 U.S.C.
19 §1a(18)(A)(xi) (2012) (post July 16, 2011) and 7 U.S.C. § 1a(12)(A)(xi) (2006) (pre
20 July 16, 2011).
21

22 13. MFP, through Phan, the Phan Common Enterprise, and other agents,
23 recruited students for its forex classes by word-of-mouth, as well as through ads
24 posted on Craigslist, You Tube, and on Vietnamese-language radio stations. The
25

1 MFP forex trading classes were often multi-day sessions, given in English or
2 Vietnamese. Tuition ranged from approximately \$500 to \$2000. MFP, through Phan
3 and others, would periodically waive the cost of the trading classes if students agreed
4 to trade a minimum volume in forex. MFP classes provided an overview of forex
5 trading as well as training in forex trading strategies. MFP, through Phan and others
6 agents, also taught a trading strategy purportedly developed by Phan.
7
8

9 14. Once individuals began taking trading classes at MFP, Phan and the
10 Phan Common Enterprise, solicited customers to open self-traded forex accounts at
11 Wal Capital and invest in the TGC forex pool by making the following fraudulent
12 statements: 1) Phan was a highly successful forex trader who had made millions of
13 dollars trading forex; 2) Phan's forex trading system, which was taught during MFP
14 classes, was a very safe system that virtually guaranteed profit over time; and, 3)
15 money deposited by Wal Capital customers and TGC pool participants would be
16 used for trading. Additionally, TGC pool participants were promised that: 4) profits
17 would be generated by trading by Phan or traders Phan trained; and, 5) they would
18 get monthly returns of 3-5%, and at least two pool participants were told their returns
19 would be as high as 15% a month.
20
21

22 15. In fact, Phan was not a successful forex trader. Between approximately
23 October 2006 and December 2011, Phan controlled at least 29 trading accounts in her
24 name, her husband's name, or in the name of various companies. Of Phan's 29
25 trading accounts, 17 accounts showed an aggregate net loss of approximately \$1.41
26
27

1 million. Despite Phan's claims of success, only one of these 17 accounts appears to
2 have been profitable, with total net profits of less than \$1,000.
3

4 16. Upon information and belief, the remaining 12 trading accounts were
5 not as profitable as Phan and the Phan Common Enterprise had represented. Of these
6 12 accounts, 9 had more funding sent to the trading accounts than returned from the
7 trading accounts, strongly suggesting that those 9 accounts suffered overall net
8 trading losses. The outstanding 3 trading accounts appear to have been net winners.
9 However, the potential profits in these 3 trading accounts ranged from approximately
10 \$3,000 to approximately \$50,000, far less than the highly successful trading
11 represented by Phan, herself and through the Phan Common Enterprise.
12

13 17. The representations made about the success and levels of risk associated
14 with Phan's trading system by Phan, herself and through the Phan Common
15 Enterprise, were also false. Phan's trading system was risky and unlikely to result in
16 profits. Phan, and other agents acting pursuant to her instruction, taught MFP
17 customers to trade without stop - loss orders, thereby exposing the customers to
18 unlimited losses in their trading. This method of trading resulted in significant losses
19 as described above. Phan's trading system was neither safe nor likely to generate
20 profits as promised.
21

22 18. As detailed below, despite their solicitations to the contrary, Phan and
23 the Phan Common Enterprise, by Phan's own admission, did not always transfer the
24 funds deposited by customers for the purpose of trading into Wal Capital's trading
25

1 accounts or the TGC pool accounts. In fact, Wal Capital never maintained
2 segregated bank or trading accounts for customer funds.
3

4 19. Despite assurances by Phan and the Phan Common Enterprise, TGC
5 funds were not always traded by Phan and/or traders trained by Phan. In sworn
6 testimony, Phan admitted that she did not trade the TGC forex pool for several
7 months despite leading pool participants to believe that their accounts were trading
8 and earning money.
9

10 20. Finally, TGC pool participants were told that they would get monthly
11 returns of 3-5% from forex trading, and at least two pool participants were told their
12 returns would be as high as 15% a month through forex trading. However, Phan did
13 not trade the TGC pool for a number of months, and pool participants accounts did
14 not appreciate.
15
16

17 **D. The Defendants' Misappropriation of Funds from Wal Capital**
18 **Customers and TGC Pool Participants**

19 21. Phan, herself and through the Phan Common Enterprise,
20 misappropriated customer funds by: 1) failing to use funds for the purposes intended
21 by the customers (e.g., using funds for business expenses, using funds to pay back
22 other customers, and failing to trade forex); and 2) failing to honor withdrawal
23 requests.
24
25

26 22. Rather than open individual accounts at a futures commission merchant
27 ("FCM"), Wal Capital customers opened what they believed to be self-traded
28 forex accounts at Wal Capital. Customers deposited funds by check, wire transfer,

1 credit card, or cash to either a Wal Capital bank account or, at times, to other
2 accounts controlled by Phan. In this way, Phan had access to Wal Capital customer
3 funds. Once Wal Capital customers deposited funds into their individual trading
4 accounts, they were then able to log into their respective accounts in order to view
5 their balances. In order for Wal Capital customers to execute futures transactions,
6 they made trades through a Wal Capital trading platform. In theory, Wal Capital
7 would then execute the transaction for a customer at an FCM in an account in the
8 name of Wal Capital and, presumably, funnel futures profits and losses back into a
9 customer account at Wal Capital.
10
11

12 23. However, despite the fact that Wal Capital customers' accounts showed
13 balances reflecting their deposits and various trades, in reality, Phan, herself and the
14 Phan Common Enterprise, did not always deposit Wal Capital customer funds into
15 their proper accounts. Phan and Phan Common Enterprise frequently diverted
16 customer deposits from Wal Capital trading accounts to be used to satisfy other
17 customer requests for pay outs. Phan and the Phan Common Enterprise also used
18 funds intended for Wal Capital customer accounts for the business expenses for the
19 Phan Common Enterprise, such as radio advertising and software development.
20
21

22 24. Similarly, TGC pool participants deposited funds primarily by checks or
23 wire transfers into a Wal Capital bank account over which Phan had control. As with
24 the Wal Capital scheme, TGC pool participants could log into a TGC website on
25 which they could view their balances. And, as with the Wal Capital scheme, TGC
26
27

1 customer deposits did not always make it to their intended location. Rather,
2 customer deposits were used to pay back other customers and for the business
3 expenses of the Phan Common Enterprise. Moreover, Phan did not trade or instruct
4 her agents to trade the TGC pool funds between at least December 2009 and August
5 2010, and failed to inform TGC pool participants that their funds were not being
6 traded. Despite this, TGC, through Phan, continued to post monthly trading profits
7 of 3-5% in the customer accounts during this time period and altered the balances
8 posted on the TGC website to reflect this fictional profit as well. Moreover, as
9 discussed above, TGC, through Phan, also altered the balances posted on the TGC
10 website to reflect the intended customer deposits of funds, despite the fact that some
11 if not all of the customer funds had been diverted.
12
13

14 25. Phan, acting on behalf of and through the Phan Common Enterprise,
15 employed a myriad of accounting devices in order to perpetrate the fraudulent
16 schemes, including: using personal and corporate bank accounts not associated with
17 the Phan Common Enterprise; cash transactions; incorporation of numerous US and
18 international legal entities through which to funnel cash; US and international trading
19 accounts; and using the assistance of other individuals to make such transactions so
20 they could not be directly traced to the Phan Common Enterprise and Phan.
21
22

23 26. When Wal Capital customers and TGC pool participants made
24 withdrawal requests, Phan, herself and through the Phan Common Enterprise, paid
25 customers through various bank accounts. These bank accounts included the Wal
26
27
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1 Capital corporate bank account and bank accounts registered to other companies
2 owned or controlled by Phan. On occasion, Phan paid customers with cash, either
3 directly or funneled through the personal bank accounts of Phan's associates. As
4 discussed above, often customer pay outs did not originate from the withdrawing
5 customer's account, but instead from incoming customer deposits.
6
7

8 27. In many instances, however, customer withdrawal requests were not
9 honored. During the course of her operation of Wal Capital and TGC, Phan, herself
10 and through the Phan Common Enterprise, gave customers who asked to withdraw
11 funds various excuses and false assurances when the withdrawal requests were not
12 met. For example, Phan told customers and pool participants that: 1) withdrawals
13 were delayed because there were "stuck positions" in the account and the funds could
14 not be withdrawn before those positions were closed; 2) withdrawals were delayed
15 because the funds were overseas and foreign authorities restricted fund transfers; and
16 3) withdrawals were delayed to avoid scrutiny by U.S. authorities. Additionally,
17 Phan, herself and through Phan Common Enterprise, falsely promised customers that
18 their withdrawals would be met by various dates, but in fact, Phan and the Phan
19 Common Enterprise failed to honor the withdrawal requests as promised. In many
20 instances, Wal Capital did not have the funds to repay the customers because the
21 Defendants had misappropriated them to pay for Phan Common Enterprise business
22 expenses and prior customer withdrawals. Phan's assurances that the funds would be
23 returned and the excuses for the delays were therefore false and misleading.
24
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III. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

28. The Court has jurisdiction over the conduct and transactions at issue in this case pursuant to 7 U.S.C. § 13a-1 (2012), and 7 U.S.C. § 2(c)(2) (2012). 7 U.S.C. § 13a-1(a), authorizes the CFTC to seek injunctive relief against any person whenever it shall appear to the CFTC that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation, or order thereunder.

29. Venue properly lies with the Court pursuant to 7 U.S.C. § 13a-1(e), in that the Defendants were found in, inhabited, and/or transacted business in the Central District of California, and the acts and practices in violation of the Act occurred within this District, among other places.

B. The Defendants Committed Fraud in Connection with Futures in Violation of 7 U.S.C. §§ 6b(a)(1)(A) and(C) and 17 C.F.R. § 5.2(b)(1) and (3)

30. Under the CEA, it is unlawful for any person to (A) cheat or defraud or attempt to cheat or defraud another person, or (C) willfully to deceive or attempt to deceive such other person by any means whatsoever, in connection with any futures transaction. *See* 7 U.S.C. §§ 6b(a)(2)(A) and (C). Pursuant to 7 U.S.C. § 2(c)(2)(C)(iv) (2012), 7 U.S.C. § 6b applies to the Defendants' forex transactions "as if" they were contracts of sale of a commodity for future delivery. Similarly, 17 C.F.R. § 5.2(b)(1) and (3)

1 prohibits fraudulent activity “in or in connection with any retail forex
2 transaction.”
3

4 31. During the relevant period, the Defendants violated 7 U.S.C. §§
5 6b(a)(1)(A) and (C) as well as 17 C.F.R. § 5.2(b)(1) and (3), with respect to acts
6 that were knowing, or had reckless disregard for the truth such as:
7

- 8 (a) Soliciting prospective participants to invest in forex through
9 fraudulent misrepresentations that the Defendant Phan was a
10 highly successful forex trader;
- 11 (b) Representing that the Defendants’ trading system was safe and
12 virtually guaranteed profit;
- 13 (c) Falsely claiming that customer monies would be used for
14 trading forex;
- 15 (d) Representing to pool participants that profits would be
16 generated by the Defendant Phan’s trading or associated
17 traders; and
- 18 (e) Promising pool participants that they would get monthly returns
19 of 3-5%.

20 C. **The Defendant Phan Committed Fraud by a Commodity Pool Operator**
21 **in Violation of 7 U.S.C. § 6o(1)**

22 32. 7 U.S.C. §§ 6o(1)(A) and (B) (2012) make it unlawful for a
23 commodity pool operator (“CPO”) or an associated person of a CPO from using
24 the mails or any means of interstate commerce to (i) employ any device, scheme or
25 artifice to defraud any pool participant or prospective pool participant, or (ii)
26
27
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1 engage in any transaction, practice or course of business that operates as a fraud or
2 deceit upon any pool participant or prospective pool participant.
3

4 A CPO is defined as any person who is:

5 (i) Engaged in a business that is of the nature of a
6 commodity pool, investment trust, syndicate, or similar
7 form of enterprise, and who, in connection therewith,
8 solicits, accepts, or receives from others, funds,
9 securities, or property, either directly or through capital
10 contributions, the sale of stock or other forms of
11 securities, or otherwise, for the purpose of trading in
commodity interests, including any---
(I) Commodity for futures delivery . . .

12 7 U.S.C. § 1a(11) (2012).

13 33. During the relevant period, Phan acted as a CPO in that she engaged
14 in a business that is of the nature of an investment trust, syndicate, or similar form
15 of enterprise, and in connection therewith solicited, accepted, or received funds,
16 securities, or property from others for the purpose of trading in commodities for
17 future delivery on or subject to the rules of any contract market. Moreover, Phan
18 was also not registered as a CPO with the CFTC during the relevant period.
19

20 34. During the relevant period, Phan, individually, and as the agent of the
21 Corporate Defendants, violated 7 U.S.C. §§ 6o(1), by defrauding and deceiving
22 participants by, among other things:
23

24 (a) misappropriating pool participants' funds;
25
(b) misrepresenting that pool participants' funds would be used for their
26 intended purposes;
27
28

1
2 (c) guaranteeing profits to pool participants, and
3
4 (d) misrepresenting the experience and success of the Defendant Phan
5 and her trading system.

6 35. The above misrepresentations and omissions of fact that Phan, made
7 to prospective and actual participants were made through use of the mails or other
8 means or instrumentalities of interstate commerce, and they were made by Phan, a
9 CPO, in violation of 7 U.S.C. §§60(1).

10
11 **D. The Defendant Phan Failed to Register as a CPO in Violation of 7**
12 **U.S.C. § 6m(1)**

13 36. U.S.C. § 6m(1), prohibits a CPO, unless registered, to make use of
14 the mails or any means or instrumentality of interstate commerce in connection
15 with its business as a CPO. During the relevant period, Phan used the mails or
16 instrumentalities of interstate commerce, including fraudulent communications
17 sent *via* email, to commodity pool customers while failing to register as a CPO.
18
19 Therefore Phan violated 7 U.S.C. § 6m(1).

20
21 **E. The Corporate Defendants' Liability Under 7 U.S.C. § 2(a)(1)(B) and 17**
22 **C.F.R. § 1.2**

23 37. Phan committed the acts and omissions described herein within the
24 course and scope of her employment as an officer or agent at or with the Phan
25 Common Enterprise. 7 U.S.C. § 2(a)(1)(B) (2012) states that:

26
27 The act, omission, or failure of any official, agent, or other person
28 acting for any individual, association, partnership, corporation, or trust

1 within the scope of his employment or office shall be deemed the act,
2 omission, or failure of such individual, association, partnership,
3 corporation, or trust, as well as of such official, agent, or other person.
4
Id.

5 Similarly, 17 C.F.R, § 1.2 (2014) provides that:
6
The act, omission, or failure of any official, agent, or other person
7 acting for any individual, association, partnership, corporation, or
8 trust, within the scope of his employment or office, shall be deemed
9 the act, omission, or failure of such individual, association,
10 partnership, corporation, or trust as well as of such official, agent, or
11 other person.
Id.

12 38. Because Phan committed her fraudulent solicitations,
13 misappropriations, and registration violations as an officer or agent of the
14 Corporate Defendants, the Corporate Defendants are liable as principals for their
15 agent's (Phan's) violations of the CEA and Regulations.
16
F. **The Defendant Phan's Liability Under 17 U.S.C. § 13c(b)**

17 39. During the Relevant Period, Phan, directly or indirectly, controlled the
18 Corporate Defendants and did not act in good faith, or knowingly induced, directly
19 or indirectly, the acts constituting the Phan Common Enterprise violations of
20 U.S.C. §§ 6b(a)(2)(A) and (C), 7 C.F.R. §§ 5.2 (b)(1) and (3). 7 U.S.C. § 13c(b)
21
22 (2012) provides that:
23
24 Any person who, directly or indirectly, controls any person who has
25 violated any provision of this chapter or any of the rules, regulations,
26 or orders issued pursuant to this chapter may be held liable for such
27 violation in any action brought by the Commission to the same extent
28 as such controlled person. In such action, the Commission has the
burden of proving that the controlling person did not act in good faith

1 or knowingly induced, directly or indirectly, the act or acts
2 constituting the violation.

3 *Id.*

4 40. Under the facts as alleged in the CFTC's Complaint, Phan directly
5 controlled the Corporate Defendants during their commission of forex fraud,
6 therefore Phan is liable for the Corporate Defendants' violations pursuant 17
7 U.S.C. § 13c(b) .
8

9 **IV. PERMANENT INJUNCTIVE RELIEF GRANTED**

10 41. Based upon and in connection with the foregoing conduct, pursuant to
11 7 U.S.C. § 13a-1, the Defendants are permanently restrained, enjoined and
12 prohibited from directly or indirectly engaging in conduct in violation of 7 U.S.C.
13 §§ 6b(a)(2)(A) and (C), and, as of October 18, 2010, 17 C.F.R. §§ 5.2(b)(1) and
14 (3). Additionally, the Defendant Phan is permanently restrained, enjoined and
15 prohibited from directly or indirectly engaging in conduct in violation 7 U.S.C. §§
16 6o(1) and 6m(1).

17 42. The Defendants are also permanently restrained, enjoined and
18 prohibited from:

19 a. entering into any transactions involving commodity futures,
20 options on commodity futures, commodity options (as that term is defined in 17
21 C.F.R. § 1.3(hh)), security futures products, swaps (as that term is defined in 7
22 U.S.C. § 1a(47), and as further defined by 17 C.F.R. § 1.3(xxx)), and/or foreign
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25
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1 currency (as described in 7 U.S.C. § 2(c)(2)(B) and 2(c)(2)(C)(i)) (“forex
2 contracts”) for their own personal account(s) or for any account(s) in which they
3 have a direct or indirect interest;

4 b. having any commodity futures, options on commodity futures,
5 commodity options, security futures products, swaps, and/or forex contracts traded
6 on their behalf;

7 c. controlling or directing the trading for or on behalf of any other
8 person or entity, whether by power of attorney or otherwise, in any account
9 involving commodity futures, options on commodity futures, commodity options,
10 security futures products, swaps, and/or forex contracts;

11 d. soliciting, receiving, or accepting any funds from any person
12 for the purpose of purchasing or selling any commodity futures, options on
13 commodity futures, commodity options, security futures products, swaps, and/or
14 forex contracts;

15 e. applying for registration or claim exemption from registration
16 with the Commission in any capacity, and engage in any activity requiring such
17 registration or exemption from registration with the Commission except as
18 provided for in 17 C.F.R. § 4.14(a)(9); and/or

19 f. acting as a principal (as that term is defined in 17 C.F.R. §
20 3.1(a)), agent, or any other officer or employee of any person (as that term is
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1 defined in 7 U.S.C. § 1a) registered, exempted from registration, or required to be
2 registered with the Commission except as provided for in 17 C.F.R. § 4.14(a)(9).
3

4 **V. RESTITUTION AND CIVIL MONETARY PENALTY**

5 **A. Restitution**

6 43. The Defendants shall be jointly and severally liable for, and shall pay,
7 restitution in the amount of one million, one hundred fifty-one thousand, nine
8 hundred fifty-four dollars and twenty cents (\$1,151,954.20) (“Restitution
9 Obligation”), plus post-judgment interest. Post-judgment interest shall accrue on
10 the Restitution Obligation beginning on the date of entry of this Order and shall be
11 determined by using the Treasury Bill rate prevailing on the date of the entry of
12 this Order pursuant to 28 U.S.C. § 1961 (2006).

13 44. To effect payment of the Restitution Obligation and the distribution of
14 any restitution payments to the Defendants' pool participants, the Court appoints
15 the National Futures Association (“NFA”) as Monitor. The Monitor shall collect
16 restitution payments from the Defendants and make distributions as set forth
17 below. Because the Monitor is acting as an officer of this Court in performing
18 these services, the NFA shall not be liable for any action or inaction arising from
19 NFA's appointment as Monitor, other than actions involving fraud.

20 45. The Defendants shall make Restitution Obligation payments under
21 this Order to the Monitor in the name “Direct Investment Products Restitution
22 Fund” and shall send such Restitution Obligation payments by electronic funds
23

1 transfer, or by U.S. postal money order, certified check, bank cashier's, or bank
2 money order, to the Office of Administration, National Futures Association, 300
3 South Riverside Plaza, Suite 1800, Chicago, Illinois 60606 under a cover letter that
4 identifies the Defendant making payment and the name and docket number of this
5 proceeding. The Defendants shall simultaneously transmit copies of the cover letter
6 and the form of payment to the Chief Financial Officer, Commodity Futures
7 Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington,
8 D.C. 20581.

12 46. Any financial institution holding funds of the Defendants is directed
13 to liquidate and release all such funds, whether the funds are held in a single or
14 joint account, or in any other capacity, and to convey them (minus any amounts to
15 cover the financial institution's administrative or wire transfer fees) by wire
16 transfer to an account designated by the Monitor within thirty (30) days of
17 receiving a copy the this Order. At no time during the liquidation, release, and /or
18 wire transfer of these funds pursuant to this Order shall the Defendants be afforded
19 any access to, or be provided with, any of these funds. The Defendants, and all
20 financial institutions subject to this Order, shall cooperate fully with the
21 Commission and the Monitor in the liquidation, release, and wire transfer of these
22 funds.

26 47. The Monitor shall oversee the Restitution Obligation and shall have
27 the discretion to determine the manner of distribution of such funds in an equitable
28

1 fashion to the Defendants' pool participants identified by the Monitor and/or the
2 Commission or may defer distribution until such time as the Monitor deems
3 appropriate. In the event that the amount of Restitution Obligation payments to the
4 Monitor are of a *de minimis* nature such that the Monitor determines that the
5 administrative cost of making a distribution to eligible pool participants is
6 impractical, the Monitor may, in its discretion, treat such restitution payments as
7 civil monetary penalty payments, which the Monitor shall forward to the
8 Commission following the instructions for civil monetary penalty payments set
9 forth below.

13 48. The Defendants shall cooperate with the Monitor as appropriate to
14 provide such information as the Monitor deems necessary and appropriate to
15 identify the Defendants' pool participants to whom the Monitor, in its sole
16 discretion, may determine to include in any plan for distribution of any Restitution
17 Obligation payments. The Defendants shall execute any documents necessary to
18 release funds that they have in any repository, bank, investment or other financial
19 institution, wherever located, in order to make partial or total payment toward the
20 Restitution Obligation.

24 49. Any amounts paid to any pool participant shall not limit the ability of
25 that pool participant from proving that a greater amount is owed from the
26 Defendants or any other person or entity, and nothing herein shall be construed in
27 any way to limit or abridge the rights of any pool participant that exist under state

1 or common law. Pursuant to Rule 71 of the Federal Rules of Civil Procedure, each
2 pool participant of the Defendants who suffered a loss is explicitly made an
3 intended third-party beneficiary of this Order and may seek to enforce obedience
4 of this Order to obtain satisfaction of any portion of the restitution that has not
5 been paid by the Defendants to ensure continued compliance with any provision of
6 this Order and to hold the Defendants in contempt for any violations of any
7 provision of this Order.

8
9
10 50. To the extent that any funds accrue to the U.S. Treasury for
11 satisfaction of the Defendants' Restitution Obligation, such funds shall be
12 transferred to the Monitor for disbursement in accordance with the procedures set
13 forth above.
14
15

16 **B. Civil Monetary Penalty**

17 51. The Defendants shall be jointly and severally liable for, and shall pay,
18 a civil monetary penalty of three million, four hundred fifty-five thousand, eight
19 hundred sixty-two dollars and sixty cents (\$3,455,862.60) within ten (10) days of
20 the date of entry of this Order ("CMP Obligation"), plus post-judgment interest.
21 Post-judgment interest shall accrue on the CMP Obligation beginning on the date
22 of entry of this Order and shall be determined by using the Treasury Bill rate
23 prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2006).
24
25

26 52. The Defendants shall pay their CMP Obligation by electronic funds
27 transfer, U.S. postal money order, certified check, bank cashier's check, or bank
28

1 money order. If payment is to be made other than by electronic funds transfer, then
2 the payment shall be made payable to the Commodity Futures Trading
3 Commission and sent to the address below:

4
5 Commodity Futures Trading Commission
6 Division of Enforcement
7 ATTN: Accounts Receivables - AMZ 340
8 E-mail Box: 9-AMC-AMZ-AR-CFTC
9 DOT/FANMMAC
10 6500 S. MacArthur Blvd.
11 Oklahoma City, OK 73169
12 Telephone: (405) 954-5644

13
14 If payment by electronic funds transfer is chosen, the Defendants shall contact
15 Nikki Gibson or her successor at the address above to receive payment instructions
16 and shall fully comply with those instructions. The Defendants shall accompany
17 payment of the CMP Obligation with a cover letter that identifies the paying the
18 Defendant and the name and docket number of this proceeding. The Defendants
19 shall simultaneously transmit copies of the cover letter and the form of payment to
20 the Chief Financial Officer, Commodity Futures Trading Commission, Three
21 Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

22
23 53. Any acceptance by the Commission or the Monitor of partial payment
24 of the Defendants' Restitution or CMP Obligations shall not be deemed a waiver of
25 the Defendants' obligation to make further payments pursuant to this Consent
26 Order, or a waiver of the Commission's right to seek to compel payment of any
27 remaining balance.
28

1 54. The Defendants shall not transfer, or cause others to transfer, funds or
2 other property belonging to the Defendants to the custody, possession, or control of
3 any members of their family or any other person or entity for the purpose of
4 concealing such funds from this Court, the Commission, or the Monitor or any
5 officer appointed by this Court.
6
7

8 **VI. MISCELLANEOUS PROVISIONS**

9

10 55. All notices required by this Order shall be sent by certified mail,
11 return receipt requested. Notices to the Commission shall be sent to the Director,
12 Division of Enforcement, Commodity Futures Trading Commission, Three
13 Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581. The
14 Defendants shall provide the Commission and the Receiver with written notice of
15 their contact telephone numbers and/or mailing addresses within thirty (30)
16 calendar days of this Order. Until such time as the Defendants satisfy their
17 Restitution and CMP Obligations as set forth in this Order, the Defendants shall
18 provide written notice by certified mail to the Commission and the Receiver and/or
19 Monitor of any change to their telephone number and/or mailing address within ten
20 (10) calendar days of the change(s).
21
22

23 56. Nothing shall serve to amend or modify this Order in any respect
24 whatsoever, unless: (a) reduced to writing; and (b) approved by order of this Court.
25
26

1 57. If any provision of this Order or if the application of any provision or
2 circumstance is held invalid, the remainder of the Order and the application of its
3 provisions to any other person or circumstance shall not be affected by the holding.
4

5 58. The injunctive and equitable relief provisions of this Order shall be
6 binding upon the Defendants, upon any person under their authority or control, and
7 upon any person who receives actual notice of this Order by personal service, e-
8 mail, facsimile, or otherwise, insofar as he or she is acting in active concert or
9 participation with the Defendants.
10

11 59. This Court shall retain jurisdiction of this cause to assure compliance
12 with this Order, the Restitution Obligation, the CMP Obligation, and for all other
13 purposes related to this action. This Order shall be interpreted and enforced
14 according to the Federal Rules of Civil Procedure, the Local Rules of the United
15 States District Court for the Central District of California, and all provisions of the
16 Act and Commission Regulations relating or referring to the obligations hereunder.
17

18 60. Copies of this Order may be served by any means, including U.S.
19 Mail, facsimile transmission, e-mail, United Parcel Service, and Federal Express,
20 upon the Defendants and any other entity or person that may be subject to any
21 provision of this Order.
22

23 61. There being no just cause for delay, the Clerk of the Court is hereby
24 directed to enter this *Order for Entry of Default Judgment, Permanent Injunction,*
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28

Civil Monetary Penalties, and Ancillary Equitable Relief Against My Forex Planet, Inc., Wal Capital, S.A., Top Global Capital, Inc., and Melody Nganthuy Phan.

SO ORDERED, this 9th day of February, 2015, at Santa Ana, California.



Cecily A

ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE